

# **EXHIBIT 2**

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, CIVIL PART  
MIDDLESEX COUNTY  
DOCKET NO. MID-L-000160-22  
APP. DIV. NO. \_\_\_\_\_

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JEFFREY ACHEY, et al.,	:	
	:	
Plaintiffs,	:	TRANSCRIPT
	:	
v.	:	OF
	:	
CELLCO PARTNERSHIP d/b/a	:	MOTION TO COMPEL
VERIZON WIRELESS; and	:	ARBITRATION
VERIZON COMMUNICATIONS INC.,	:	
	:	
Defendants.	:	

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Place: Middlesex County  
(Heard via Zoom)

Date: July 15, 2022

BEFORE:

HONORABLE J. RANDALL CORMAN, J.S.C.

TRANSCRIPT ORDERED BY:

MICHAEL C. ZOGBY, ESQ. (Faegre Drinker Biddle &  
Reath LLP)

APPEARANCES:

STEPHEN P. DeNITTIS, ESQ. (DeNittis Osefchen  
Prince, P.C.)

- and -

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Attorneys for the Plaintiffs

JEFFREY JACOBSON, ESQ. (Faegre Drinker Biddle &  
Reath LLP)

- and -

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Sullivan, LLP)  
Attorney for Defendants Verizon Wireless and  
Verizon Communications, Inc.

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1 (Proceedings commenced at 11:16 a.m.)  
 2 THE COURT: All right. It's quarter after  
 3 11, July the 15th. This is Judge Corman, Middlesex  
 4 County Superior Court.  
 5 Our next case is L-160-22. Plaintiffs are  
 6 Jeffrey Achey, et al., defendants are Cellco  
 7 Partnership doing business as Verizon Wireless and  
 8 Verizon Communication, Incorporated.  
 9 Will the plaintiffs' counsel please enter an  
 10 appearance.  
 11 MR. DeNITTIS: Good morning, Your Honor.  
 12 Stephen DeNittis from DeNittis Osefchen and Prince on  
 13 behalf of the plaintiffs.  
 14 THE COURT: Will defendants' counsel please  
 15 enter an appearance.  
 16 MR. JACOBSON: Good morning, Your Honor.  
 17 This is Jeffrey Jacobson from Faegre Drinker. I'm  
 18 joined by my colleague Marina Lev from Quinn Emanuel,  
 19 whose pro hac motion is pending. I'll be doing the  
 20 arguing on the motion.  
 21 THE COURT: Okay. This is the defendant's  
 22 order to -- to stay and compel arbitration.  
 23 Counsel, what would you like to tell me about  
 24 your motion?  
 25 MR. JACOBSON: Your Honor, this is Jeffrey

1 Jacobson, again.  
 2 The three most important facts relevant to  
 3 this motion are undisputed.  
 4 The plaintiffs agree that they consented to a  
 5 contract requiring the -- requiring them to arbitrate  
 6 disputes.  
 7 They agree that all of the claims they want  
 8 to pursue against Verizon are covered by that agreement  
 9 to arbitrate. And the customer agreement itself  
 10 incorporates either customers have the choice of the  
 11 AAA or Better Business Bureau. It incorporates the  
 12 rules of the AAA and the BBB. And both of those rules  
 13 delegate to arbitrators the kind of challenges that the  
 14 plaintiffs are making to the customer agreements  
 15 enforceability.  
 16 The Third Circuit, every Federal District  
 17 Court in New Jersey to consider the issue in the  
 18 Appellate Division on multiple occasions, albeit in  
 19 unpublished decisions, has held that reference to rules  
 20 with delegation provisions suffices to require courts  
 21 to let arbitrators decide these challenges and not hear  
 22 them themselves.  
 23 I'd submit, Your Honor, that those three  
 24 facts are decisive here. The plaintiffs'  
 25 unconscionability arguments with regard to the customer

1 agreement are wrong. And I'm happy to talk to the  
2 Court about why they're wrong, but those are fights we  
3 should be having in front of arbitrators and not Your  
4 Honor.

5 It's likely that the Court has questions  
6 about the main argument plaintiffs here have made  
7 against compelling these claims to arbitration, which  
8 is the idea that the customer agreements, mass  
9 arbitration provisions, and the statutes of limitation  
10 applicable to plaintiffs' claims are what they call a  
11 one-two punch, effectively block plaintiffs from  
12 pursuing these claims at all. It's just not.

13 With respect to the statute of limitations,  
14 the people represented by plaintiffs' counsel here in  
15 arbitration cases, and they say they've got about 2500  
16 of them, have all provided timely notices of claim as  
17 the customer agreement requires.

18 Your Honor, it would be beyond disingenuous  
19 for Verizon to argue that the limitations period is  
20 continuing to run against these people while they're  
21 following the agreement's mass arbitration provisions.  
22 Verizon has never made that argument and we would be  
23 laughed at by any arbitrator if we tried.

24 The customer agreement's mass arbitration  
25 provision provides a bellwether process for a series of

1 ten claims to go forward at a time, plaintiffs choose  
2 five, Verizon choose five. See how those go. Another  
3 process after that. See how those go. And it -- that  
4 bellwether process allows -- has two goals. It's  
5 primary goal is to foster resolution of a mass of  
6 claims by letting the parties test their arguments in a  
7 fair sampling of cases. If Verizon goes ten and oh,  
8 one suspects the plaintiffs will not throw good money  
9 after bad. On the other hand, if Verizon goes oh for  
10 ten, and then if which ever side loses maybe wants to  
11 try again and goes oh for ten again, it would be very  
12 difficult for either side to contend that the batching  
13 process should continue rather than yielding an  
14 agreement to resolve the claims on -- on a mass basis.

15 But here's the important part. Your Honor,  
16 the customer agreement explicitly says that the  
17 bellwether process should proceed, and this is a quote,  
18 "until the parties are able to resolve all of the  
19 claims." And it gives the court full authority to  
20 enforce that part of the agreement.

21 So if plaintiffs are right on the merits,  
22 which they're not, but if the plaintiffs are right on  
23 the merits and they prove that, if they beat Verizon  
24 consistently in the bellwether cases and if Verizon  
25 doesn't act appropriately in response, nothing stops

1 these counsel from coming back to the court and seeking  
2 relief. But that's a lot of ifs. They haven't  
3 happened yet. And Verizon has no reason to believe  
4 they'll ever happen.

5 And, by the way, the customer agreement says  
6 that every winning customer in arbitration gets \$5,000  
7 minimum, plus attorneys' fees. So -- while the process  
8 unfolds. So there's no -- there's no incentive for  
9 Verizon to keep going if it -- if it's losing. By  
10 contrast, as I said, there's no incentive for  
11 plaintiffs to keep going if they're losing.

12 But the second goal of the mass arbitration  
13 provision is just as important as the first. It's to  
14 avoid a situation where Verizon has to choose between  
15 an unfair settlement that the plaintiffs haven't earned  
16 by advancing the merits of their claims or paying AAA  
17 millions of dollars in fees for arbitration cases that  
18 in all relevant likelihood will not actually proceed.

19 And the plaintiffs' argument that Verizon is  
20 the only company it knows of that's adopted a provision  
21 like this, it so happens that I got an e-mail as a --  
22 as a Microsoft customer this morning that Microsoft  
23 adopted the identical provision last night. The only  
24 difference between Microsoft and Verizon is that  
25 Microsoft's batching process is 50, not 10.

1 So this is something that companies in  
2 Verizon's position are dealing with this mass  
3 arbitration problem the same way. It does not make  
4 sense, I would submit, to allow thousands of  
5 arbitration claims to be filed at once where the only  
6 consequence of filing is triggering an obligation on  
7 the part of Verizon, or whatever company is in  
8 Verizon's position, to pay thousands of dollars to AAA  
9 for each claim filed. And it allows lawyers on the  
10 other side to be able say, hey, either settle with us  
11 or you've got to write a multimillion-dollar check to  
12 AAA.

13 That's all we're trying to avoid through this  
14 batching process. And as I said, if the batching  
15 process goes poorly for Verizon and Verizon were to try  
16 to continue to force claims into arbitration after it  
17 went oh for ten or oh for twenty, that would be the  
18 time for plaintiffs to come back and argue that Verizon  
19 is acting disingenuously, that Verizon is acting  
20 contrary to the stated goal of the process, which is to  
21 yield a resolution.

22 But it's not -- that -- that claim is not  
23 ripe now. What should happen now, because there's no  
24 disagree about the existence of a -- of an agreement to  
25 arbitrate disputes. There's no dispute that these

1 claims are covered by it. And the other challenge that  
 2 plaintiffs made to enforceability of certain other  
 3 provisions of the agreement are for the arbitrators.

4 So if the Court has any questions, I'm happy  
 5 to address those questions. It may be more  
 6 appropriate, though, to hear what plaintiffs have to  
 7 say and then I can briefly reply.

8 THE COURT: Thank you, Counsel.

9 All right. We'll go to plaintiffs' counsel.  
 10 What do you got to say about all that?

11 MR. DeNITTIS: Sure, Your Honor.

12 Well, I'd like to start off first that -- why  
 13 we're here. We're here -- plaintiffs would like to  
 14 bring their case as a class action. A class action  
 15 where other than a filing fee with the court, there is  
 16 no cost to do a class action. There would be no fees  
 17 by AAA arbitration or by any other arbitration service.

18 We're faced with this arbitration clause  
 19 because this is what defendants drafted and this is  
 20 what defendants wanted because they want to avoid a  
 21 class action. They want to not have a case with a mass  
 22 amount of people.

23 So we're -- we -- we do represent 2500 other  
 24 people, not New Jersey persons, but people from other  
 25 states in arbitration. And it is \$3,000 a person to do

1 such arbitration. But as you see here, defendants want  
 2 this in arbitration. So this is -- they want these 27  
 3 people to be with those persons. This is where they  
 4 want to be, despite the cost.

5 But any -- any argument that this is like  
 6 some type of extortion attempt or that this is some  
 7 type of a way for plaintiffs to take advantage of the  
 8 process is -- is really somewhat ridiculous in that  
 9 this is what defendants wanted. This is what they  
 10 drafted. I mean, they don't have to have an  
 11 arbitration clause. They could actually withdraw their  
 12 motion if they're so worried about the filing fees and  
 13 permit us to just go forward with our case. It's not  
 14 certified yet. It's 27 people.

15 So I want to make that mention to the Court  
 16 because this isn't -- there isn't some reason to feel  
 17 pity for Verizon. The reason why these companies are  
 18 drafting these clauses is because of the advent of the  
 19 mass arbitration. Yes, consumers are aggrieved.  
 20 Consumers are frustrated. And court -- and companies  
 21 like Verizon have been getting sued because this is  
 22 what they require since we can't do a -- they don't  
 23 want a class action in court. They -- people file mass  
 24 arbitration. And, unfortunately, the process is very  
 25 costly. And so now that this is happening, defendants

1 don't like it.

2 And so defendants attempted in several courts  
3 to say, oh, these mass arbitrations are unfair and  
4 these should not be enforceable because it's so costly  
5 and they've lost on every single case where they've  
6 attempted to do that because -- because courts around  
7 the country have said, really, you've been arguing to  
8 enforce arbitration for 40 years, you -- you have what  
9 you want and now because people have filed a large  
10 number of claims, you don't like it, tough, this is  
11 your agreement.

12 So I want to -- I want to make sure the Court  
13 is aware this -- this is not some pity party for  
14 Verizon.

15 Now to get to the merits of what Your Honor  
16 has to decide in this motion. Defense counsel is  
17 right, there is an agreement and people didn't  
18 willingly consent because it's a contract of adhesion,  
19 but when they bought their phones they had an eight-  
20 page arbitration clause thrust upon them without much  
21 choice, and they signed it. We agree on that.

22 But what defense counsel leaves out is, Your  
23 Honor has two decisions to make. One, who should  
24 decide this arbitration motion. And it should be Your  
25 Honor, which I'll get to. And then, two, should -- is

1 this conscionable. Because just because people agree  
2 to an arbitration clause, yes, there's the Federal  
3 Arbitration Act. But the Federal Arbitration Act and  
4 the case law makes clear that any arbitration clause  
5 for it to be enforceable must not be unconscionable.  
6 And so -- and that is Your Honor's function as the  
7 gatekeeper, to make that determination.

8 And we submit, for all the reasons set forth  
9 in our papers and I'm going to put forth today, this is  
10 not only unconscionable, this is really one of the most  
11 uneven, over-heavy handed agreements for a consumer to  
12 have to face to litigate their claims.

13 So let's get to the delegation clause. As --  
14 as the Federal Court determined in the MacClelland  
15 case, this exact issue, which is persuasive authority  
16 before Your Honor, not -- not binding authority. But  
17 the standard in California is identical to the standard  
18 in New Jersey, which is there's a presumption. Under  
19 Morgan v. Stanford, New Jersey Supreme Court 225 N.J.  
20 289, (2016), there's a standard for whether who --  
21 whether an arbitrator or a court decides an arbitration  
22 court -- clause.

23 And the Supreme Court has said it's a  
24 presumption that the court decides the arbitration  
25 clause, unless there's clear and unmistakable evidence

1 that the parties agreed to arbitrate arbitrability.

2 Here there's four main reasons why this  
3 should be decided by Your Honor and not by an  
4 arbitrator.

5 Number one, the clause, the eight-page  
6 arbitration clause, in several instances is aspects of  
7 the clause to be enforced by the Court as defense  
8 counsel pointed out, that we could go back to court if  
9 we don't like the mass arbitration provision and -- and  
10 have the Court decide that portion of the arb clause.  
11 Which it's really not clear what portion is referenced  
12 by that -- by the -- by that -- by that statement.

13 It also references AAA and BBB rules, which  
14 they conflict, and I'll get to that in a moment.

15 And so those are really big issues.

16 And, third, which you -- we didn't cite this  
17 in our papers because we didn't -- we couldn't file a  
18 surreply, but there's a case that decides this exact  
19 issue called Alpert Goldberg Butler v. Quinn, 410 N.J.  
20 Super. 510, (App. Div. 2009). And what that court says  
21 -- what -- what that case says is, in order for there  
22 to be a proper and enforceable incorporation by  
23 reference of a separate document or website, the  
24 document to be incorporated must be described in such  
25 terms that its identity may be ascertained beyond doubt

1 and the party to be bound by the terms must have had  
2 knowledge of and assented to the incorporated terms.

3 And that case was also -- and that's a  
4 published decision.

5 THE COURT: What's the cite --

6 MR. DeNITTIS: And that was also --

7 THE COURT: -- on that, Counsel? Give me the  
8 cite again, Counsel.

9 MR. DeNITTIS: Sure. It's 410 N.J. Super.  
10 510.

11 THE COURT: Thank you.

12 MR. DeNITTIS: Appellate Division 2009.

13 THE COURT: Okay.

14 MR. DeNITTIS: And it's -- al -- Alpert v.  
15 Quinn.

16 And that's also followed by Bacon v. Avis  
17 Budget Group, 357 F.Supp 3d. 401, (D.N.J. 2018).

18 That -- the Bacon case deals specifically --  
19 they both deal with arbitration clauses. And what that  
20 means is, if you're going to make it set forth that  
21 you're going to incorporate something by reference, and  
22 the Bacon case was right on point with this, as well,  
23 you just can't blanket refer to something. It has to  
24 be specific. It has to be exactly to what is looking  
25 to be enforced.

1 If you look at the arb clause, all that  
2 reference says is, it says you could go to AAA.com or  
3 BBB.com for our rules. It doesn't link right to the  
4 rules.

5 So a person would have to go on the cite,  
6 would then have to navigate the site, which we -- we  
7 invite Your Honor to try to do that. And then you have  
8 to try to find where the delegation clause is in that  
9 agreement.

10 So Verizon is expecting someone  
11 unsophisticated, not attorneys, to get an eight-page  
12 arbitration clause and then read it while they're  
13 buying their cell phone, and then navigate through  
14 whether in certain instances a court is to decide or if  
15 AAA rules apply or if BBB rules apply. And then  
16 they're supposed to go to that website and then  
17 navigate through the website, they have to dig around  
18 to find what rules actually apply to delegation.

19 I mean, that's interesting is, there's not --  
20 the word delegation is not even in their eight-page  
21 arbitration clause. It's not even in it.

22 And so those two cases are directly on point  
23 and they're published cases.

24 The cases that defense counsel is referring  
25 to are unpublished cases, even the Third Circuit case

1 is unpublished. And Third Circuit and Federal cases  
2 are not binding on this Court. It's New Jersey case  
3 law is what controls. And we ask that you look at the  
4 Quinn case and you look at -- the Bacon case cites to  
5 the Quinn case. And they're right on point. And so  
6 their incorporation of that is -- is invalid.

7 But, more importantly, even if Your Honor  
8 were going to get to the threshold question of, okay,  
9 well, let me look at these two clauses, trip -- AAA  
10 says an arbitrator should decide the clause. BBB says  
11 the arbitrator has the ability to decide what claims  
12 should be included in the arbitration, not decide  
13 unconscionability. It does not say the Court is -- the  
14 arbitrator is to decide the issue of whether the  
15 clauses is enforceable under unconscionability analysis  
16 or not. All it says is, it's to determine what claims  
17 are to be covered within the arbitration.

18 So that in itself conflicts. And we cited an  
19 Appellate Division case, Rockel v. Cherry Hill Dodge,  
20 which states where an arbitration clause is conflicting  
21 on the delegation issue -- which this certainly is.  
22 There's portions of this that gives it to the Court,  
23 there's portions of this that gives it to AAA, there's  
24 portions of this that give it to BBB. And then even if  
25 a person could find those two rules, because they're

1 not specifically cited to, which is -- makes it invalid  
 2 under Quinn, but even if they can find it, they  
 3 conflict.

4 And so if you look at Rockel v. Cherry Hill  
 5 Dodge, when -- when there's delegation clauses or --  
 6 that conflict, or whose to decide if that conflicts,  
 7 the Court is to throw it out and let the Court decide.

8 And so in this -- and by the way, these --  
 9 you know, this isn't -- this has already been decided  
 10 once. So you have -- Your Honor has a nice roadmap in  
 11 MacClelland, which has the same standard, which is the  
 12 clear and unmistakable standard. That's the same in  
 13 California. And another court in California just  
 14 decided less than a month ago that this exact clause  
 15 should be decided by the Court.

16 So I have nothing else to say on the  
 17 delegation issue.

18 I'd like to go to why this agreement is so  
 19 one-sided and unconscionable. So as we set forth in  
 20 our papers, there's several reasons why this -- this  
 21 arbitration clause (inaudible). Out of the gate,  
 22 before I even get to the public policy issues and also  
 23 the issues of having ten cases go forward at a time,  
 24 something that's really overbearing and -- and really  
 25 unfair to the customers is, the contract bars extrinsic

1 evidence.

2 So the beginning of the arbitration clause  
 3 says, any dispute between you and us, you being the  
 4 customer, whether it's with a sales rep., whether it's  
 5 billing disputes, whether it deals with the product,  
 6 must go to arbitration. But then later in the clause  
 7 it says all disputes -- this -- it says this agreement,  
 8 which is the customer agreement, governs all disputes  
 9 and no extrinsic evidence can be relied upon, whether  
 10 it be documents, advertisements, or statements from  
 11 sales representatives.

12 The problem with that clause, Your Honor, is  
 13 the customer agreement doesn't have the terms. The  
 14 customer agreement doesn't have the pricing. The  
 15 customer agreement doesn't have representations in the  
 16 advertisements. The customer agreement doesn't have  
 17 what people say. So we will be unable to prove our  
 18 case if we go to arbitration.

19 We're challenging in this case that Verizon  
 20 told people in their bills that they have -- that they  
 21 have to pay surcharges and that the surcharges in their  
 22 bill say that they're government fees, federal charges,  
 23 or taxes that are imposed and that they're going to be  
 24 passed on to you. And they list as an administrative  
 25 charge under their surcharges that it's a government

1 fee, which we contend is a total lie.

2 Their advertisements gave people a flat price  
3 of what their charges would be and they say surcharges  
4 could apply. However, the surcharges here, we're  
5 contending, are a lie, that they just are another part  
6 of profit in their profit plan that they impose on  
7 people and it wasn't imposed -- they weren't honest  
8 with people.

9 But we can't prove our claim. We're in -- if  
10 this goes to arbitration, we're not going to be allowed  
11 to rely on a bill. We're not going to be allowed to  
12 rely on an advertisement. We're not going to be  
13 allowed to bring in witnesses to testify as to what  
14 they told people when they bought their plan. We will  
15 lose our claim. We will lose. We will not be able to  
16 prove our claim because the customer agreement doesn't  
17 have the terms we need.

18 To get to the other egregious portions of the  
19 agreement, the agreement says because defendants are  
20 afraid of mass arbitrations, which is a -- which is a  
21 (indiscernible) phenomenon over the last couple years  
22 and we're pursuing one here. They don't want to pay  
23 the arbitration costs, but they have to have the  
24 arbitration agreement say that they're willing to pay  
25 the costs or the agreements will be procedurally

1 unconscionable.

2 So they say they want to pay the cost. So  
3 their new way to get out of basically preventing a mass  
4 case and hearing -- picking off people one by one is to  
5 have this -- this clause that says if you per --  
6 client, decide to hire a law firm, that law firm, if  
7 they have more than 25 persons, have to go through this  
8 claim process of 10 claims going forward at a time, 5  
9 picked from the defendant and 5 picked from the  
10 plaintiff.

11 So what's wrong with that? Well, first of  
12 all, if a person wants to do this cumbersome process,  
13 they have to either decide, well, if I stick with my  
14 attorney, who has all these claims, being us, over  
15 2500, this case is going to take 145 years to decide.

16 The defendants' argument to that position by  
17 plaintiff is, well, we have the bellwether process.  
18 And the bellwether process it -- of course, it's not  
19 going to take this long. And there's no reason or  
20 incentive for us to do more than ten at a time because  
21 if we lose the ten, we're going to settle and if we win  
22 the ten, plaintiffs are going to give up. Well, that  
23 sounds nice in theory, but that's not what the contract  
24 says. And we've got to go by what the contract says,  
25 not by just what Verizon might do gratuitously trying

1 to predict how this case goes.

2 The contract says, Verizon has the right to  
3 either settle cases after the bellwether process or  
4 continue to arbitrate. So what does that mean, if we  
5 have to continue to arbitrate? That means we pick 10  
6 at a time out of the 2500 people. That means,  
7 according to AAA's own website, each arbitration is  
8 going to take 6.9 months -- and even if it's  
9 streamlined in some purpose. Let's say they have 10 go  
10 at a time, that -- that's going to take 6.9 months,  
11 even a year, 10 at a time. And we have to get through  
12 2500.

13 Now what's onerous about that? The agreement  
14 says that they reserve the right to challenge the  
15 statute of limitations. So what's the big deal about  
16 that? That's a big deal because the plaintiffs can't  
17 even file any claims until the first ten are heard. So  
18 if you're someone, you know, a thousand in down the  
19 batch, 1500 in down the batch, your case can't even be  
20 filed. And if you look at that many people and you  
21 can't say the -- the bellwether process, oh, this is  
22 never going to happen. This is what the contract says  
23 will happen if they -- if we don't settle. You've got  
24 to do ten at a time. So it's going to 145 years for  
25 these cases to be heard. It's going to -- the statute

1 of limitation will expire and the people will be dead,  
2 literally.

3 And now the defendants in California, because  
4 they saw this as a problem, they said, oh, we're going  
5 to amend, we're not going to enforce the statute of  
6 limitations. Well, even if you don't enforce the  
7 statute of limitations, which, by the way, they can't  
8 waive it. There's a -- we briefed that. They can't --  
9 they can't change it midstream in the litigation. But  
10 even if the Court were to say, well, they said -- you  
11 know, Mr. DeNittis, they said they're going to waive  
12 the statute of limitations, that doesn't matter. It's  
13 going to take 145 years for this -- for this to be  
14 decided.

15 We can't, as plaintiffs, against a company  
16 like Verizon, have to hope that they're going to be  
17 gratuitous and settle with us. What's -- the defense  
18 counsel said what's the incentive for them to continue  
19 litigating. The incentive is to preclude claims.  
20 What's the incentive for them to settle? They could  
21 have ten go at a time, have very little exposure, and  
22 take years for these cases to be decided. Hundred --  
23 over a hundred years. Why -- why would they settle? I  
24 mean, I don't see why they would. It's ridiculous.

25 So in addition to that clause, it also

violates five -- Rule 5.6(b) of the Rules of Professional Conduct. Why? Because the only way a consumer gets out of this egregious agreement about having to wait 145 years, potentially, for their claim to be decided, is for them to pick another attorney.

And under Rule 5.6(b) and under the Cardillo case and under the Jacobs case, a person has an unfettered right of choice of counsel. Unfettered. It's a very important rule.

So now these people are going to have to -- they're like, well, if we want DeNittis Osefchen and Prince, who has been doing consumer litigation for over 30 years, we don't want to -- you know, if we use them, our claims are going to be decided -- may never be decided or now we have to choose another -- another law firm. Well, guess what? That's against public policy and that's against the Rules of Professional Conduct, and that also makes this agreement unenforceable.

So this agreement is unenforceable already because it bars any extrinsic evidence. It's against public policy because it's affects people's right to choose their attorney. And, also, it should be unenforceable because it precludes claims from people ever potentially getting their cases heard.

I mean, again, Your Honor, another court, in

MacClelland, a federal judge found that our arguments on this were persuasive and ruled that the entire clause was unconscionable because these egregious provisions being -- being unenforceable.

But it doesn't stop there. What -- what's crazy is, that's not the extent of why this is -- should not be enforceable. Another reason is, it bars damages.

So there's one section of the agreement that says an -- the arbitrator can award the same damages as a person -- as if they're in court. But then later it says a person may not get consequential damages, treble damages, punitive damages, injunctive relief. Well, guess what? The Supreme Court said that that type of clause limiting damages is unenforceable in the case -- again, Brown v. Sanford, and the other cases that we cite.

So that's another reason Your Honor could say, hey, this is unconscionable, this is restricting people's rights that they would have in court. And there's authority for it, Your Honor, for that reason to throw it out.

Another reason to throw it out is, the clause conflicts as to attorney fees. It says the -- the arbitrator may award attorney's fees if there's fee

1 shifting. But then it give us convoluted, really, hard  
 2 for an attorney -- we -- our -- our office had to read  
 3 it multiple times to follow, where arbitration clause -  
 4 - fees may be awarded but they may not be awarded,  
 5 really limiting quite extensively when attorney fees  
 6 can be awarded. That's another reason to throw this  
 7 out.

8 In addition, it's a contract of adhesion.  
 9 These people did not have their right to choose. They  
 10 didn't have a right to choose this agreement. Every  
 11 cell phone company, every cable company, every -- most  
 12 consumer contracts, every gym membership, they have  
 13 arbitration clauses and class action waivers. Try to  
 14 go in to buy a cell phone and say, well, you know,  
 15 Verizon, I'm not signing this agreement. Oh, I'm not -  
 16 - I want you to take this clause out. They're not  
 17 going to take this out. I mean, they won't. They'll  
 18 say, sorry, we can't sell you a phone.

19 So, again, that's another reason why this  
 20 should be unenforceable.

21 So for all of these reasons, number one, we  
 22 think it's clear, Your Honor is to decide what -- that  
 23 -- whether this contract is unenforceable or not.

24 And then for all the reasons I just  
 25 articulated and that are in our papers, this should not

1 be -- under -- Your Honor, the last decision Your Honor  
 2 has to make, if you agree with plaintiffs, is can you  
 3 sever these clauses and allow some of this to go to  
 4 arbitration and some of it to stay?

5 Or, can you throw the whole clause out. And  
 6 under the Dong Ho case that we cited, if a -- if a  
 7 contract is permeated with unconscionability  
 8 throughout, which I think for all the reasons I just  
 9 articulated, frankly, how can Your Honor not, but if  
 10 you find that it's permeated throughout the agreement,  
 11 Your Honor is -- just throw out the entire arb clause  
 12 and let the case stay in court.

13 So for all of these reasons, Your Honor, I  
 14 respectfully submit that, one, that Your Honor decide  
 15 that this issue of whether the arbitration clause is  
 16 unconscionable or not. Two, respectfully, find that it  
 17 is unconscionable for all the reasons I articulated,  
 18 which, again, I don't think you'd be taking a -- a real  
 19 leap here. This is already what one federal court has  
 20 found. And then, third, just severing the entire  
 21 agreement.

22 For all these -- all these reasons, Your  
 23 Honor, I respectfully submit.

24 THE COURT: All right.

25 MR. JACOBSON: Can I reply briefly, Your

Honor?

THE COURT: You may.

MR. JACOBSON: This is Jeffrey Jacobson, again. Thank you, Your Honor, for your time.

It seems we agree that the main question here is who decides. Is it for the arbitrator to decide these questions that Mr. DeNittis raised or is it for Your Honor?

Mr. DeNittis talked about the case in California, MacClelland, that was decided a few weeks ago. And Mr. DeNittis said that the standard in California is the same standard that Your Honor should apply, except it's not. The only reason why Judge Chen decided that California case as he did is because the Ninth Circuit that controlled him left open the question of whether in a consumer contract reference to the AAA rules suffice to delegate questions like that to the arbitrator.

The Third Circuit and every other Federal Circuit Court of Appeals that's looked at this issue -- and by the way this is a case that's controlled by the Federal Arbitration Act, so the Federal Court decisions here interpreting the FAA should be dispositive. The Third Circuit did not leave that question open. No other circuit has.

And so, you know, we don't agree with Judge Chen's opinion. We've already appealed from Judge Chen's opinion to the Ninth Circuit. That -- it's going to take some time, but it's simply not true that that California case applied the same standard because it couldn't have. He was bound by Ninth Circuit precedent. Here, I understand that the Third Circuit is Federal, but we've got Appellate Division unpublished decision saying incorporation of AAA rules is enough. We've got a Third Circuit authoritative decision saying incorporation of AAA rules is enough. And so these questions really should be decided by the arbitrator not by Your Honor.

Mr. DeNittis cited two cases, Alpert against Quinn and Bacon against Avis, and he said that those dealt with arbitration agreements. That wasn't quite true, either. The Alpert against Quinn case didn't involve arbitration at all. And the Bacon against Avis case did not involve incorporation of AAA rules. It was a question of whether the arbitration agreement incorporated terms from the rental jacket that the customer received.

So neither of those cases contradicts the Third Circuit's holding that if you cite AAA rules it suffices to delegate arbitrability questions to the

1 arbitrator.

2 So once the Court decides, if it does, that  
3 incorporation of AAA rules delegates every other  
4 question that Mr. DeNittis raised to the arbitrator,  
5 that's the ball game. That means we compel arbitration  
6 and Mr. DeNittis can make these points to the  
7 arbitrator and off we go. And there is no basis in any  
8 New Jersey decision, in any Third Circuit decision for  
9 the Court to hold that incorporation of AAA rules does  
10 not suffice to delegate these issues to the arbitrator.

11 And just a couple of points in response to  
12 Mr. DeNittis. He -- he, again, raises this idea that  
13 Verizon can just keep arbitrating these cases until the  
14 cows come home. Again, that's not what the clause  
15 says. If Verizon goes oh for ten and then maybe goes  
16 oh for twenty, and if we try to keep going, the clause  
17 provides a role for the Court. Because the stated goal  
18 of this batching process is to yield a resolution. And  
19 if Verizon is acting unreasonably, there is an explicit  
20 invocation of the Court's authority to do something  
21 about it. That issue -- that situation is just simply  
22 not presented here. We haven't started the batching  
23 process yet. Not a single one of these claims has been  
24 arbitrated.

25 So, you know, again, this -- this idea that

1 we can't try the bellwether process and see what  
2 happens because it's unconscionable is just not right.

3 The next thing Mr. DeNittis talked about was  
4 what I'll call the contractual integration clause,  
5 which says that the agreement is the agreement.

6 So, you know, this is another issue that  
7 should be decided by the arbitrator. But I have to  
8 say, I don't understand Mr. DeNittis's argument about  
9 this provision at all. It says that the written  
10 contract is the contract and a consumer can't argue  
11 that something an agent said orally is also part of the  
12 contract. I don't understand what's wrong with that.

13 The first sentence of the customer agreement  
14 says, "your service terms and conditions are part of  
15 the agreement." So Mr. DeNittis's statement that the  
16 pricing terms aren't part of the agreement is simply  
17 wrong.

18 And nothing in this provision stops the  
19 customer from arguing that something an agent said to  
20 him or her, you know, that fraudulently induced the  
21 customer to execute the contract is -- you know, that  
22 you can make a fraudulent inducement claim under this  
23 provision and you can use something an agent said as  
24 the basis for a statutory consumer fraud claim.

25 Verizon hasn't argued otherwise and I would say that

1 this provision doesn't give it a basis to argue  
2 otherwise.

3 And the other provision that Mr. DeNittis  
4 pointed to is that the agreement does contractually  
5 preclude anything other than direct damages. He may or  
6 may be -- may or may not be right. But that bar on  
7 treble damages is enforceable against New Jersey  
8 consumers asserting claims under the CFA. That's a  
9 question for the arbitrator.

10 I do know that in plaintiffs' brief when they  
11 cited the Morgan against Sanford Brown case, which is  
12 225 N.J. 289, they did not characterize that case  
13 correctly.

14 In Morgan, the Supreme Court held that once  
15 the Appellate Division had determined that an agreement  
16 delegated unconscionability questions to the  
17 arbitrator, the court should not have opined at all on  
18 whether the treble damages bar was enforceable in that  
19 case.

20 Yes, it's true the Supreme Court said in that  
21 case that, however -- you know, they used the words  
22 "however correct it may be" when they were referring to  
23 the Appellate Division's statement that the bar on  
24 treble damages in the arbitration agreement was not  
25 enforceable. But they held that that was a decision

1 that should have been made by the arbitrator, as it  
2 should be here.

3 So, you know, I get it. I -- I -- I know  
4 what he's trying to do. It's what they did  
5 successfully in California under a different standard,  
6 but there are a couple of challenges he wants to make  
7 to the arbitration agreement, all of which can be  
8 easily presented to the arbitrator and the arbitrator  
9 can make the decisions and, you know, that's what  
10 happens in these cases.

11 Your Honor, I'll just end where I began.  
12 They filed 2500 -- or they want to file 2500 AAA  
13 arbitrations. They could file all of these cases in  
14 small claims court today, if they wanted to. The  
15 agreement allows that.

16 They want to have these claims go forward in  
17 arbitration immediately because they think Verizon  
18 should have to write a big check to AAA. And they  
19 cited some other cases where companies did not have  
20 provisions like this, where there was not a batching  
21 process, and the company said, well, wait a minute, we  
22 shouldn't have to write this big check, and the court  
23 said, well, yes, you should because the contract didn't  
24 provide, as Verizon's does, for a batching process.

25 Here we have one. It should go forward. If

1 something goes wrong with it, there's a role for the  
2 Court later. But there's nothing in the agreement that  
3 it's unconscionable or should preclude the Court --  
4 and, no, sorry.

5 One last thing. I apologize.

6 This idea that we're stopping people from  
7 having their choice of counsel, we're not. As we said  
8 in our reply brief, as many people can hire Mr.  
9 DeNittis and Mr. Hattis as want to hire them. And they  
10 can get the benefit of their experience and the benefit  
11 of the fact that they have a lot of claims. And if  
12 there's a mass resolution, they would be included in  
13 it. All it says is, let's have a bellwether process.  
14 Let's see how it goes.

15 So this is not a case where we're interfering  
16 with people's choice of counsel. It's not a case where  
17 we're making people wait 149 years. We're going to  
18 have ten cases that are going to move forward shortly.  
19 If it's too late to get a New Jersey person in that  
20 first batch, we can make sure a New Jersey person gets  
21 in the second batch. We can test all these claims  
22 under the CFA.

23 And if something goes wrong, there a couple  
24 of provisions allowing the Court to sound off later.  
25 But for now, we submit that these cases should be --

1 should be compelled into arbitration.

2 THE COURT: Counsel, I've got a question for  
3 you. The --

4 MR. JACOBSON: Sure.

5 THE COURT: You say that the issue of treble  
6 damages, that -- that's a question for the arbitrator?

7 MR. JACOBSON: It should be. Because all of  
8 these questions about enforceability of anything other  
9 than the arbitration agreement itself are for the  
10 arbitrator. So once -- in other words, once the Court  
11 finds that the agreement was validly formed, whether or  
12 not that ban on treble damages is enforceable as  
13 against a New Jersey consumer under the CFA would be  
14 for the arbitrator, that's correct.

15 THE COURT: Okay.

16 MR. JACOBSON: Which is exactly what the  
17 Supreme Court said in Morgan against Sanford Brown.

18 MR. DeNITTIS: Your Honor, if I may just  
19 respond to a couple points? I'll be brief.

20 THE COURT: You may.

21 MR. DeNITTIS: So just so Your Honor  
22 understands, the FAA doesn't mandate that this gets --  
23 that -- that the -- the arbitrator decides this issue.  
24 The FAA says courts are to look at state contract law  
25 to determine unconscionability and who decides the

1 arbitration clause.

2 So this is your decision, Your Honor, number  
3 one. It's not that the FAA is mandating you to do  
4 anything.

5 As to this whole issue about referring to a -  
6 - the AAA's rules and standards it -- that is  
7 referenced by incorporation. First, defense counsel  
8 makes it sound like there's all of these cases all  
9 around the country that have held this. They're not  
10 before Your Honor. The only cases that defense counsel  
11 has cited are a couple unpublished federal cases that  
12 are not binding on this court. This is a -- this is  
13 state law contract law that is binding on this court.  
14 So they are not binding. And they weren't even  
15 published decisions, number one.

16 Number two, they're distinguishable in that  
17 they only had AAA. Here we have AAA and we have BBB  
18 and we also have instances where the Court is to  
19 decide. That wasn't presented in any of those federal  
20 cases that were unpublished. Okay. And so this --  
21 this notion that, oh, this is such a well-settled issue  
22 is just not true.

23 Third, I -- I will be comfortable to rest on  
24 Your Honor reading Alpert v. Quinn and the Bacon case  
25 that we cite, that you wrote down, and Your Honor could

1 decide for yourself if you think those cases would be  
2 applicable here.

3 What those cases talk about is reference by  
4 incorporation either to another document or to a  
5 website and that it has to be specific and that it has  
6 to be clear and that it has to be with -- identified  
7 without doubt.

8 And I ask Your Honor to look at their  
9 arbitration clause that they have before Your Honor and  
10 you go on to the website and try to find -- try to find  
11 what defense counsel makes it that it's so easy to  
12 identify as to the rules that are supposed to apply  
13 here.

14 Third, I find it interesting, defense counsel  
15 and defendant's position is very contradictory. They  
16 say the bellwether process is fine because they could -  
17 - you could do ten cases at a time and then they could  
18 go back to court if someone doesn't like it because the  
19 Court should decide that issue. We're asking the Court  
20 right now to decide the enforceability of the mass arb  
21 restriction. We're asking the Court to do that.

22 So what the defendants are asking, right, to  
23 Your Honor is, well, don't decide this. You know --  
24 they've argued to the Court you should -- it's up to  
25 the courts to decide that issue, let it go to

1 arbitration, let it kind of ferret itself out and then  
 2 whoever is unhappy with it can come back and challenge  
 3 it. Well, we're asking you to -- to review it right  
 4 now.

5 They're basically telling us to go -- I don't  
 6 understand that argument. They're saying, well, you  
 7 could do the bellwether process, do ten, see how they  
 8 come out, and then either party -- it's not like it  
 9 (inaudible) basically says either party could challenge  
 10 this clause with the court. The (inaudible) we're  
 11 doing it now. We're challenging that issue -- that  
 12 clause right now with the Court. They're saying don't  
 13 decide it, go to arbitration, then if you don't like  
 14 the results of the arbitration, come back and attempt  
 15 to throw it out.

16 Why even go through that expense and that --  
 17 those steps? Your Honor could decide it right now.  
 18 And I don't think either of us disagree on that.

19 Also, again, you have to read what the  
 20 contract says. This whole bellwether process is  
 21 bologna. It says after the ten are heard, it could  
 22 settle or the parties can continue to arbitrate. So  
 23 what's going to be -- what's going to happen is, what  
 24 defendant wants to happen is, let ten go forward. And  
 25 then after those ten cases are decided, they could

1 pretty much unilaterally decide if they want to settle  
 2 or not.

3 And if they don't want to settle, they're  
 4 going to say, well, keep arbitrating because why -- why  
 5 would they not? They're not, certainly, going to go to  
 6 court and challenge it.

7 So we're asking for Your Honor to review it  
 8 now. I mean, that's -- I don't under -- I don't -- I  
 9 really don't understand that argument.

10 And so, you know, that -- those are -- are --  
 11 are really just what I wanted to respond to.

12 I think -- you know, I think the case law is  
 13 clear by the Supreme Court of New Jersey to decide who  
 14 determines the arb -- arbitrability of an arbitration  
 15 clause. It's presumed to be the court, unless it's  
 16 clear and unmistakable. And I think the cases that  
 17 defendant cites are just unpersuasive and they're  
 18 persuasive authority, at best, anyway.

19 Look to the New Jersey cases that we cite,  
 20 and Your Honor could determine is this clear and  
 21 unmistakable. We submit it's not. We submit it just  
 22 simply isn't.

23 And so, you know, we would ask that not only  
 24 do you decide the arb clause, but you could also get to  
 25 the unconscionability issues.

1 I think I went on at length about why it's  
 2 unconscionable. I just think you could look at -- you  
 3 know, look back at our arguments. They're in the  
 4 papers. I think the -- I think at this point, not to  
 5 belabor different points, I think they speak for  
 6 themselves. I think this is a really egregious  
 7 agreement.

8 Not to mention, even the process of picking  
 9 ten arbitrations, that's a conflict for defendant --  
 10 for plaintiffs' counsel. Because being that these  
 11 claims could be time precluded, we'd have to pick five.  
 12 That's a conflict of interest for us, Your Honor. How  
 13 do we -- which five do we pick? And if we -- as we go  
 14 through this process, we pick five, defendants pick  
 15 five. If defendants decide they don't want to settle,  
 16 then we are going to be faced with a timing -- a timing  
 17 issue.

18 And, you know, defense counsel is like, well,  
 19 why would we ever enforce like the statute of  
 20 limitations. Well, because they want to get out of  
 21 liability. It's -- I mean, it's -- you know, that's  
 22 not -- you know, they make it sound like they're very  
 23 benevolent, but I'm sure they'll do whatever they can  
 24 to preclude claims.

25 And so, you know, again, you have to look to

1 what the agreement says. And even forcing plaintiffs'  
 2 counsel to have to choose between five and then another  
 3 five and then another five, that in itself is a  
 4 conflict. We haven't chosen five. We refuse to do so  
 5 because we believe it's a conflict.

6 And so, you know, this -- this agreement,  
 7 other than the California court that heard this, these  
 8 agreements, as defense counsel just emphasized, like  
 9 Microsoft just changed theirs, another company that  
 10 we're familiar with, Optimum, just changed theirs, this  
 11 -- Verizon not to long ago changed theirs, this is --  
 12 this is a recent advent to avoid this mass arbitration  
 13 process that companies are so fearful of.

14 This is not settled law. The only reportable  
 15 case or the only case -- I don't know if it's a  
 16 published decision yet. The only case that's dealt  
 17 with this exact issue and the exact clause before Your  
 18 Honor is the MacClelland case, which found in our  
 19 favor.

20 So, you know, it's not -- this is -- these --  
 21 there's going to be more of these cases, for sure, that  
 22 go before the Court because this is just a really  
 23 egregious clause.

24 And so I -- you know, with all that, Your  
 25 Honor, I appreciate your patience, and we -- we submit

1 on the (inaudible).

2 MR. HATTIS: Your Honor, be -- before we  
3 submit, I'm sorry, this is Dan Hattis. I -- I'm co-  
4 counsel with Steve DeNittis. I think I have a pro hac  
5 vice pending. I just had -- if I could speak just for  
6 60 seconds, if I would have the permission of the  
7 Court?

8 THE COURT: I'm going to time you, Counsel.

9 MR. HATTIS: Okay. Excellent.

10 With regard to the delegation issue, you  
11 know, the -- what -- the Better Business Bureau  
12 arbitration rules do not have a delegation clause. And  
13 -- and Judge Chen in -- in the MacClelland case found  
14 so.

15 And, in fact, I defy Verizon to find a single  
16 case in the entire nation that ever found that there's  
17 a delegation clause in the BBB rules.

18 As -- as my colleague said, it only says that  
19 the arbitrator should -- so what they cite in their  
20 papers is the arbitrator should decide any disputes  
21 about whether a particular issue falls within the  
22 parties' arbitration agreement. Well, act -- what --  
23 what falls in the agreement, not the validity of the  
24 clause itself, which is very different than what he AAA  
25 says.

1 Also with regard to the -- you know, the  
2 point that, well, why don't we file in small claims.  
3 We're also asking in these arbitrations for injunctive  
4 relief to stop the -- to stop the charging of the --  
5 the fee in the future.

6 THE COURT: Five seconds, Counsel.

7 MR. HATTIS: And, you know, that's something  
8 small claims can't do.

9 Okay. And -- and anyway, that's -- that's --

10 THE COURT: I think you made your point,  
11 Counsel.

12 MR. HATTIS: -- generally, you have the  
13 ability to do --

14 THE COURT: Thank you very much.

15 All right.

16 MR. HATTIS: Thank you.

17 THE COURT: Gentlemen, give me a -- a few  
18 minutes. I want to look at these cases that you've  
19 highlighted for me. I'll take another look at them.  
20 Give me about 20 minutes.

21 MS. LEV: Do you want us to stay on the line,  
22 Your Honor?

23 THE COURT: Stay on the line. I'll have an  
24 answer I'll have a decision.

25 MS. LEV: Okay. Thank you.

1 (Recess taken 12:02 p.m. to 12:30 p.m.)  
 2 THE COURT: All right. It's 12:30. I took a  
 3 little more time than I wanted to.  
 4 We're back on the record in L-160-22.  
 5 We have plaintiffs' counsel on the line?  
 6 MR. DeNITTIS: Yes.  
 7 THE COURT: We have defendants' counsel on  
 8 the line?  
 9 MR. JACOBSON: Yes, Your Honor.  
 10 THE COURT: All right. I've gone through all  
 11 this. I looked at some of those cases. And let me  
 12 just start out by saying that I really have no basic  
 13 hostility to the concept of arbitration. It's part of  
 14 -- the New Jersey Supreme Court has said that that's --  
 15 you know, we do want to try to resolve cases and this  
 16 is one of the way we do it, consistent with Federal  
 17 Arbitration Act and, as well, as the New Jersey  
 18 statutes.  
 19 I have to note that -- that -- I have to say  
 20 that I'm unconvinced that the bellwether process set  
 21 forth in this agreement is, per se, unconscionable.  
 22 I'm not quite so sure this really limits plaintiffs'  
 23 right to choose their own counsel.  
 24 On the subject of arbitrability, Justice  
 25 Albin does say in the Morgan case that this has got to

1 be clear. There is language in both the rules for AAA  
 2 or Better Business Bureau arbitration that does seem to  
 3 indicate that arbitrators get to decide what's  
 4 arbitrable and what's not. Whether that's clear enough  
 5 to meet the standards established by Justice Albin, who  
 6 just retired, I'm -- I'm not going to get into right  
 7 now.  
 8 I'm going to have to deny the motion based on  
 9 the issue -- based on the fact that the agreement bars  
 10 treble damages. By barring treble damages, basically,  
 11 you -- you eviscerate the -- the applicability of the  
 12 Consumer Fraud Act.  
 13 Treble damages, along with counsel fees,  
 14 that's the heart of the Consumer Fraud Act. That's  
 15 what gives the act its teeth. It's been upheld to be  
 16 constitutional.  
 17 And the purpose -- the purpose of treble  
 18 damages, it's intended to punish the wrongdoer and  
 19 deter others from engaging in unfair and deceptive  
 20 commercial practices. That's -- you'll find in the  
 21 Supreme -- New Jersey Supreme Court cases of Furst v.  
 22 Einstein Moomjy, 182 N.J. 1, that's at 14, it's 2004  
 23 case.  
 24 And without -- without that, you don't have -  
 25 - you don't have the deterrence factor about -- about

1 unconscionable practices in the marketplace.

2 Now you can have arbitration. You can have  
3 these things arbitrated. The courts have clearly  
4 allowed that. That's -- the Appellate Division case is  
5 Gras v. Associates First Capital 346 N.J. Super. 42, an  
6 Appellate Division case from 2001, certification was  
7 denied by the Supreme Court.

8 And the Court found no inherent conflict  
9 between arbitration and the underlying purposes of the  
10 Consumer Fraud Act, noting that the plaintiffs can  
11 vindicate their statutory rights in the arbitration  
12 forum. But if there's no treble damages, they're not  
13 vindicating their rights under the consumer -- under  
14 the Consumer Fraud Act. It -- it just cuts the legs  
15 out from -- from that -- that particular remedy.

16 And defense counsel suggested, well, the  
17 arbitrator could decide whether or not this can be  
18 enforced. And I disagree. This is not a question of  
19 whether the arbitrator decides what's arbitrable. This  
20 is a question of whether or not the agreement itself is  
21 unconscionable and contrary to public policy.

22 Every Superior Court judge takes an oath to  
23 uphold the laws of the State of New Jersey. I can't  
24 delegate -- I can't farm that out to a AAA arbitrator.  
25 That's a responsibility of this Court to determine and

1 not some private party.

2 And it -- so I have to find that an agreement  
3 that allows a business -- a corp -- you know, a  
4 business entity to immunize themselves from -- from the  
5 Consumer Fraud Act through arbitration agreements to be  
6 contrary to public policy. I mean, they -- they can no  
7 more do that than they can have an arbitration  
8 agreement that says they're not bound by the law  
9 against discrimination, they're not bound by minimum  
10 wage laws.

11 Now all those things, the rights of -- of  
12 consumers or their employees can all be referred to  
13 arbitration, but you can't erase their rights by virtue  
14 of the -- the arbitration agreement.

15 That's what makes this agreement  
16 unconscionable on its face. And, therefore, I am  
17 required to deny the motion.

18 Counsel, if you'd like to file an appeal,  
19 that's fine by me. If the Appellate Division says I'm  
20 wrong, no hard feelings.

21 MR. JACOBSON: But, Your Honor, this is  
22 Jeffrey Jacobson.

23 THE COURT: No. Counsel, that's my decision  
24 and --

25 MR. JACOBSON: No. But, Your Honor,



1 THE COURT: Okay.  
 2 MR. JACOBSON: It's -- it's -- it's in the  
 3 docket as Page 2 of --  
 4 THE COURT: Is this --  
 5 MR. JACOBSON: -- the documented we submitted  
 6 on -- attached to our -- one of our declarations on May  
 7 13th.  
 8 THE COURT: May 13th. Let me find that. I  
 9 can find that.  
 10 MR. JACOBSON: Page 2 of 124.  
 11 THE COURT: May 13th. Motion to stay case.  
 12 And I'm already logged in.  
 13 Which declaration? The Kennedy Declaration  
 14 Part 1 or Part 2?  
 15 MR. JACOBSON: It's page -- so I -- I --  
 16 separated everything when I --  
 17 THE COURT: What page is it on?  
 18 MR. JACOBSON: -- transported myself -- it's  
 19 on Page 9 --  
 20 THE COURT: Okay.  
 21 MR. JACOBSON: -- of the documents that were  
 22 submitted 11:21 p.m.  
 23 And I can read the Court the language. It's  
 24 at the very end of the agreement.  
 25 THE COURT: Oh. Here we go. I got the

1 customer agreement in front of me.  
 2 MR. JACOBSON: So at the -- at the very -- at  
 3 the -- at the very end it reads:  
 4 "If any part of this agreement, including  
 5 anything regarding the arbitration process," and then  
 6 there's an except that doesn't apply, "is ruled  
 7 invalid, that part may be removed from this agreement."  
 8 THE COURT: All right. Let's find the  
 9 section --  
 10 MR. JACOBSON: It's in the (inaudible)  
 11 paragraph of the --  
 12 THE COURT: Okay. Okay. I see that.  
 13 MR. JACOBSON: -- customer agreement.  
 14 THE COURT: Treble damages. Let me find  
 15 that.  
 16 (Court reviewing document)  
 17 THE COURT: And where do I find the thing  
 18 about treble damages. Where is that at?  
 19 MR. JACOBSON: So the treble damages is in --  
 20 I'm sorry. The beauty of having it up this way is I  
 21 can search for the word treble.  
 22 UNIDENTIFIED SPEAKER: It's on their Exhibit  
 23 A, Your Honor, of the -- in support of the reply that  
 24 was filed on June 10th.  
 25 MR. JACOBSON: It's -- it's Page 6 of the --

1 it's page -- it's Page 5 of the agreement. It's Page 6  
2 of the exhibit. It's under the waivers and limitations  
3 of --

4 THE COURT: Waivers and limitations --

5 MR. JACOBSON: -- liability.

6 THE COURT: -- liability. Okay.

7 (Court reviewing document)

8 THE COURT: Well, I think I probably have to  
9 strike out any damages permitted under the Consumer  
10 Fraud Act are severed.

11 MR. DeNITTIS: Judge, if I may be heard on  
12 this?

13 THE COURT: Go ahead.

14 MR. DeNITTIS: So the contract says "may."  
15 It doesn't say you have to do it. It's still your  
16 decision.

17 THE COURT: Yeah. I know.

18 MR. DeNITTIS: And under the cases that we  
19 cite in our papers, both NAACP of Camden v. Foulke  
20 Management, 421 N.J. Super. 404, (App. Div. 2011), as  
21 well as Dong Ho Lee v. Eun Kyung Park, which is an  
22 unpublished LEXIS opinion at 1233, at 35, (App. Div.  
23 May 27, 2015). It's your discretion whether to either  
24 strike it or --

25 THE COURT: Yeah. Counsel, I -- I -- I get

1 all that.

2 What I'm -- what I'm going to -- I am going  
3 to sever this. And if you want to file a motion for  
4 reconsideration, because I'm focusing -- mostly I'm  
5 focusing on the issue of consumer fraud. Once I  
6 spotted that last night when I was reading through all  
7 this, that's what I tended to focus on. And, you know,  
8 if there's something that -- that I didn't really --  
9 you want to take another run at this, I'll let you.  
10 Okay.

11 MR. DeNITTIS: Okay.

12 THE COURT: And maybe you'll convince me on  
13 something else. Who knows.

14 But what I will do, because the -- the damage  
15 issue -- I mean, there are certain -- the damages that  
16 are permitted under the Consumer Fraud Act, not  
17 necessarily -- I don't know that I can limit that to  
18 direct damages.

19 So what language? What would I use?

20 Okay. All right. I'm going to -- I'm  
21 striking -- this is the language.

22 The limitation on damages clause is severed  
23 as unconscionable to the extent that it conflicts with  
24 damages that are available under the Consumer Fraud  
25 Act, including, but not limited to treble damages.

1 So that's my decision.

2 So now do you want to -- you want to -- if  
3 you think I gave short shrift to your arguments about  
4 whether or not the arbitrability -- delegation on  
5 arbitrability was sufficient, that's fine. I'd be  
6 happy to take another look at that.

7 That's my decision for today. Have a good --  
8 have a good weekend, guys.

9 MR. JACOBSON: Thank you, Your Honor.

10 MR. DeNITTIS: Thank you, Your Honor.

11 (Proceedings concluded at 12:47 p.m.)  
12

13 CERTIFICATION  
14

15 I, Lisa Mullen, the assigned transcriber, do  
16 hereby certify the foregoing transcript of proceedings  
17 on CourtSmart, Index No. from 11:16 a.m. to 12:47 p.m.,  
18 is prepared to the best of my ability and in full  
19 compliance with the current Transcript Format for  
20 Judicial Proceedings and is a true and accurate  
21 compressed transcript of the proceedings, as recorded.

22 /s/ Lisa Mullen

23 Lisa Mullen

AD/T 413

AOC Number

07/18/2022

Date

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